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Appendix D: Relevant excerpts from the Committee's minutes

**Report No. 13-01 of the Committee on Standard Jury Instructions (Civil)
Products Liability Instructions**

**SUPREME COURT COMMITTEE ON
STANDARD JURY INSTRUCTIONS (CIVIL)**

MINUTES

Tampa, FL

Hillsborough County Edgecomb Courthouse

July 12, 2012 (1:00 p.m. to 5:00 p.m.)

July 13, 2012 (8:30 a.m. to 12:00 p.m.)

1. PRODUCTS LIABILITY

Vargas discussed the Florida Supreme Court's decision on the Committee's proposed products instructions; some were approved and some were sent back for further work. Supreme Court Clerk Tom Hall sent a letter to the Committee asking for a report on all remaining instructions to be completed by November 19, 2012. The instructions the Court wants the Committee to revisit are the definition of a defective product, the crashworthiness instructions (in light of the legislative history), the inference of defect instructions (*Cassisi* and government rules), and a few other minor instructions (preliminary issue and burden of proof). The Committee also needs to revise the model charges and verdict forms. Vargas has broken out five issues and assigned each to a subcommittee member. To meet the Court's deadline, the Committee's work must be done by the October meeting, with publication of proposals for comment by the October 1, 2012, issue of the Florida Bar News.

Barton noted Clerk Hall's letter said a motion for extension of the November 19, 2012, deadline can be filed. Barton also reported that he sent Clerk Hall an email with questions raised by the Court's decision. Vargas stated there were discrepancies between the appendix to the Court's decision and the Committee's appendix of instructions. For example, in instruction 403.7 (definition of strict liability), the Committee's proposal defined product defect using the consumer expectation test or the risk benefit test. The Committee substantially debated the definition of defect. The Court's appendix states that instruction 403.7 is "reserved," but the strike-through shows some changes to the proposal with different standards for manufacturing and design defect. This has confused many Committee members.

Kest noted that there were only two months until the publication date for the new proposals and advocated for requesting more time. Barton noted that his email to Clerk Hall asked if the Committee should try hard to meet the current deadline or should ask for more time. Clerk Hall has not yet provided an answer. Barton asked if the Committee believes it should request more time. Vargas asked if Barton's email, which raises some substantive issues, should be made a formal motion for rehearing. **Fox moved to immediately request an extension of the Court's November 19, 2012 deadline; Hinkle seconded; no objection from any Committee member. Boyer suggested requesting a firm deadline given the amount of time that has already passed on this issue. The Committee agreed to request an extension until April 15, 2013, which**

should give two meetings to discuss the proposals. Barton said that, even though an extension will be requested, the subcommittee should start working hard now. **Vargas will provide a revised timeline for the subcommittee's work.**

Barton also asked the subcommittee to review the recent Third DCA *Union Carbide* decision in re-crafting these instructions.

**SUPREME COURT COMMITTEE ON
STANDARD JURY INSTRUCTIONS (CIVIL)**

MINUTES

Jacksonville, FL

Duval County Courthouse

October 25, 2012 (1:00 p.m. to 5:00 p.m.)

October 26, 2012 (8:30 a.m. to 12:00 p.m.)

2. PRODUCTS LIABILITY

Barton reported that the Supreme Court has approved April 15, 2013 as the deadline for the Committee to submit its revised products liability proposals following the Court's opinion on its earlier proposals.

Vargas directed the Committee to the subcommittee's report (beginning on p. 131 of the materials), which details what the Committee submitted to the Court in 2009, what the Court approved, and what remains to be worked on. Most of the proposed instructions were approved. One remaining issue is instruction 403.7, defining strict liability. Another issue is the inference instruction; the Committee did not propose an inference instruction and the Supreme Court rejected this proposal without explanation. Another issue is the crashworthiness instruction, which the Court disapproved without comment. In developing revised proposals in response to the Court's decision, the subcommittee also sought to harmonize the proposals with the new Book and other revisions to the standard instructions after the products instructions were previously submitted.

Vargas noted that, although the Committee asked for clarification on certain issues following the Court's decision, no clarification was provided. The subcommittee did its best to work through the issues. Barton asked whether the Committee should ask for clarification again. Vargas said the Committee should move forward and use its best understanding of the Court's direction. But she noted that one area in which the Committee could ask for clarification concerns instructions 403.13 and 403.14. Vargas asked if this could be done by motion or letter. Barton said Clerk Hall reported that the Committee would receive a letter from the Court; he does not know if it will be just about the approved extension of time or also answer some of the Committee's requests for clarification. Vargas's concern is that the clarification questions are substantive. She believes the new report should just note the issues that were unclear and provide new proposals based on what the Committee understands the Court asked for. Barton agreed that the Committee should submit its report and the Court will do what is necessary.

a. 403.7 – Strict Liability

The Committee's previously-proposed instruction 403.7 combined manufacturing and design defects into one product defect instruction that included both the risk-benefit and consumer-expectation tests. The Supreme Court rejected that proposal. The subcommittee's new proposal (p. 145 of the materials) separates out the definitions of manufacturing and design defects, as was done in the prior PL 4 and 5 instructions. Vargas noted that everyone agrees that the risk-benefit test does not apply to manufacturing defects. However, in developing the previously-submitted proposal, there was substantial debate within the Committee about whether the risk-benefit test is a test for defect that is an element of the claim or an affirmative defense. The Committee's prior proposal used both the risk-benefit and consumer-expectations test and a note on use stated the Committee took no stance on whether the risk-benefit test was an element or an affirmative defense. The notes on use listed the cases under each test for the reader's consideration.

After receiving the Committee's proposal, the Supreme Court asked for comments on whether the instructions should comment on the risk-benefit analysis and whether to collapse the tests for manufacturing and design defects. The *Agrofollajes v. DuPont* case from the Third District came out in the interim and held that, in that case, the risk-benefit test applied and the consumer-expectation test did not. Vargas noted that the oral argument participants before the Supreme Court on the Committee's proposal all agreed that different tests are needed for manufacturing and design defects.

Vargas stated that, although the Court rejected the proposed 403.7, it did not provide much guidance for the Committee. In the appendix to its opinion, the Court separated out the instructions on design and manufacturing defects. The Court also removed the risk-benefit test in two places in the appendix (from instructions 403.7 and 403.15). But the Court did not remove a note on use to instruction 403.18, concerning affirmative defenses, which stated that the Committee took no position on whether the risk-benefit test was an element or an affirmative defense. Justice Pariente's concurring opinion, written to give the Committee guidance, stated that the definition of strict liability in the instructions has been in place since the 1980s. According to Justice Pariente, the Court and Committee should wait for an actual case or controversy to change the instruction defining strict liability.

The subcommittee also considered another intervening case, *Union Carbide v. Aubin* from the Third District, which suggests the risk-benefit test is an element and not an affirmative defense. Vargas hopes that the *Union Carbide* case will be decided by the Supreme Court and provide some guidance.

Given the foregoing, including the new *Agrofollajes* and *Union Carbide* cases, the subcommittee recommends retaining the two separate tests (consumer-expectation and risk-benefit) and updating the note on use to cite these new cases. This gives attorneys and judges the cases and allows them to make arguments as appropriate. Baggot added that the Committee is operating in a vacuum, as there is no clear law for guidance. Vargas agreed there is no clear law.

Baggot noted that the issue of whether the risk-benefit test is an element of the claim or an affirmative defense is important because of the discovery requests that follow when a defendant alleges the risk-benefit test as a defense.

Boyer believes the Supreme Court said to take the risk-benefit test out as an element. Boyer observed that the Court struck the risk-benefit test as an element from the proposed instruction. The Court's appendix (p. 194 of the materials) modifies the Committee's proposal (p. 246 of the materials) by deleting the risk-benefit test as part of rewording the instruction before striking it entirely.

Baggot does not agree that the Court clearly stated that the risk-benefit test should be taken out as an element. Vargas agreed with Baggot that it was not clear that the Court wanted the risk-benefit test out as an element. There is no further substantive guidance in the text of the opinion, other than in Justice Pariente's concurring opinion's suggestion to start with the old PL instructions. Lucas thinks it is reading too much into the decision to find that the Court was rejecting the risk-benefit test as an element. Vargas agreed, especially because of the new Third District cases recognizing it as an element. One of the Justices expressed concern at oral argument that the Committee had not considered some of the comments received after the Committee's submission, including the new *Agrofollajes* case. Since the Third District uses the risk-benefit test as an element, the Committee cannot make law by saying the risk-benefit test is not an element. Vargas believes it is premature to delete the risk-benefit test as an element without a case saying that expressly. Baggot noted that Justice Pariente said the same thing in her concurring opinion.

Barton asked what the subcommittee believed the strikethrough in the Court's appendix meant. Vargas assumes the Court was providing some guidance by rewording the proposed instruction and then striking it. But the Court and Clerk Hall have not provided clarification or guidance on that point in response to the Committee's inquiries. Kest believes the strikethrough means the Court thinks its reworded language is not sufficient. He thinks the Committee needs guidance from the Court on what it meant; he does not think there is a starting place without guidance. Kest noted they could have put nothing there and said "reserved." Hinkle believes the Court tried to rework it, found it difficult, stopped, and sent it back to the Committee for a first draft.

Lang found Justice Pariente's concurrence most persuasive, but it was unclear who she agreed with. Vargas and Barnett believe the Committee should work on the language in the instructions and submit a proposal to the Court. The Committee then began discussing the subcommittee's new proposals.

i. 403.7a – Manufacturing Defect

Vargas directed the Committee to the subcommittee's proposed manufacturing defect proposal (p. 145 of the materials):

a. Manufacturing defect

A product is defective from a manufacturing defect if it is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product] and the product is expected to and does reach the user or consumer without substantial change affecting that condition.

A product is unreasonably dangerous because of a manufacturing defect if it does not conform to its intended design and fails to perform as safely as the intended design would have performed.

Barnett found the proposed language confusing. Vargas noted the language is from the old PL 4 (p. 230 of the materials), as that is what the subcommittee gleaned was what the Court wanted. The language is close to what the Court rewrote and then struck through in the appendix to its recent decision.

Barnett suggested revising the instruction to say “a product has a manufacturing defect if . . .” Ingram believes there needs to be a defective product for liability, not just a product with a defect in it. Barnett asked if they meant “a product is considered defective if....” Vargas said that was the goal.

Barnett and Boyer questioned the language “substantial change *affecting that condition.*” Vargas thinks the change needs to affect something related to the defect, not just a change in the product. Hinkle suggested “affecting the defective condition.” Barnett suggested “affecting that unreasonably dangerous condition.” Lucas and Vargas found that suggestion unwieldy. Wiggins suggested taking out manufacturing defect from the beginning and putting it in “affecting that condition.”

Barnett asked if they can remove the term “manufacturing defect” from the instruction since it’s in the title; but it was noted that the titles are not read to the jury. Barton stated it needs to be in the text of the instruction.

There was concern expressed about the “from” language in the first line and what can be used to make that more clear, while still telling the jury it is a manufacturing defect. The old PL 4 instruction used “if by reason of.” Ingram suggested “as a result of.” Boyer wondered if the word “defect” can be removed in the first line. Kest believes there needs to be parallel language in the two proposals. Whitmore noted that the subcommittee’s proposal is the same as PL 4, with a Plain English revision. Barnett wondered if “conform to intended design” is Plain English. Whitmore believes the instructions should be left as they were; there is no law to authorize a substantive modification; the only changes should be non-substantive. Vargas said Stewart agrees that the Court said go back to PL 4 and 5.

Kest observed that this proposal uses only the consumer-expectation test as the test for a manufacturing defect. Vargas said that was correct.

Barton agreed that the Committee should go back to PL 4 and 5 and noted that this language is slightly different than what the Court rewrote in its appendix and then struck through as insufficient. Boyer does not believe the Supreme Court wants the old PL language, as it has asked for more Plain English instructions.

Hinkle suggested changing “from” to “because of” and changing “does not conform” to “is different from.” Baggot asked if there was a substantive difference in changing “does not conform.” Wiggins believes that phrase is a relic of an old case and no one has ever tried to improve it. Whitmore believes there is a difference between “does not conform” and “is different from.” Baggot thinks more time is needed to consider these changes and whether they are substantive. Vargas suggested “was not built according to its intended design.” But others noted that some products are not “built.” Ingram asked if the second “intended” in the last sentence is needed, as he does not know of an “unintended” design. Kest said he has a case where the designer was saying the product as manufactured was not what he intended. Kest asked if there was a reason. Hinkle believes there may be a reason for the second “intended.” Boyer believes “intended” should be taken out to see if the Supreme Court approves. Ingram believes it is mixing apples and oranges to use “intended” with “design.”

Barton asked Fox if the language in the old PL instruction has caused any confusion, and Fox said it is not a problem. Barton noted that, despite the goal to make everything Plain English, this is one where the old language may need to prevail because it has worked for years. After the extended discussion, the open issues for the Committee to still consider are the change from “conform with” to “different from” and whether to retain the word “intended” before design.

ii. 403.7b – Design Defect

The Committee next considered the subcommittee’s design defect proposal (p. 145 of the materials):

b. Design defect

A product is defective from a design defect if it is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product] and the product is expected to and does reach the user without substantial change affecting that condition.

A product is unreasonably dangerous because of its design if [the product fails to perform as safely as an ordinary consumer would expect when used as intended or when used in a manner reasonably foreseeable by the [manufacturer] [seller] [distributor] [supplier] [importer]] [or] [the risk of danger in the design outweighs the benefits].

The Committee discussed making the same change as in the manufacturing defect instruction to take out “from” in first line and replace it with “because of.”

Vargas noted this design defect proposal is the same as the old PL 5, with some changes to comport with the format of new Book. Barton asked what those changes were. Vargas said they changed “if by reason of” to “from” and that was pretty much it. Barton said the report should state these changes are more stylistic than substantive. Ingram suggested changing “foreseeable by” to “foreseeable to.”

Vargas agreed. Barton was unsure. Kest, Barnett, and Fox stated “by” should still be used. That was the consensus.

iii. 403.7 – Notes on Use

Vargas stated the subcommittee recommends changes to some of the notes on use (pp. 146-47 of the materials). Note 1 deletes a discussion about language to be added to the instruction in the case of a manufacturing defect. Note 3 adds references to the *Agrofollajes* and *Union Carbide* cases. Ingram noted an extra comma in the second reference to *Agrofollajes*. Note 4 changes some language about the *Force* decision.

b. 403.15 – Issues on Main Claim

Vargas directed the Committee to the subcommittee’s related proposal to modify instruction 403.15 (p. 156 of the materials), even though the Supreme Court approved that instruction as written. The subcommittee recommends revising 403.15 to separate out the manufacturing and design defect issues that were collapsed in the Committee’s prior submission. The subcommittee also recommends adding back the risk-benefit test.

Kest wondered why the Committee was seeking to change something the Court had already approved. Barton and Vargas explained that these changes are a natural extension of the changes to 403.7. Barton further noted that Kest’s concern was one of the clarification questions the Committee asked, which the Supreme Court has not yet answered. **Barton said this reason for changing an approved instruction would be explained in the report to the Court.** Vargas noted that the Court’s decision said the whole package of products instructions is not approved until all individual instructions are approved, implying that some approved instructions would need to be revisited (as the Committee is doing here).

Ingram asked if the changes made to 403.7 during this meeting should also be tracked into this instruction. Vargas noted that “intended” is used in 403.15, which raises a similar issue. It also uses “built,” and Baggot has noted that all products are not “built.” Wiggins believed that some action – built, made, etc. – is needed.

Barton adjourned the meeting at 4:45 p.m.

FRIDAY – OCTOBER 26, 2012

Barton called the meeting to order at 8:35 a.m.

The Committee thanked Boyer and his wife for Thursday’s outstanding dinner at their home.

Before the substantive discussion, Barton asked Jennings to discuss the new format of the CD/DVD of the Committee’s materials. Jennings explained that the disc contains the current agenda, previous minutes, and relevant materials for subcommittees. The immediate tab goes back to 2008, and there is a tab for archived materials with all the historical information available. The new format of the disc also has tabs for each current subcommittee that contains materials for that subcommittee for the meeting. If the subcommittee has nothing for the

meeting, the tab will be there but empty. **Barton asked subcommittees to advise Jennings of what materials the subcommittee wants moved to the tab for the materials for that subcommittee that is relevant to the meeting at hand.**

6. PRODUCT LIABILITY (CONT'D)

a. 403.7 – Strict Liability (cont'd)

Vargas began by referencing the issues left on the table from yesterday.

i. 403.7a – Manufacturing Defect (cont'd)

On the issue of whether to use the language “conform to its intended design” from the old PL 4, Vargas believes that language should stay in the instruction. She believes it is appropriate because *Union Carbide* cites the Restatement (Third), which still uses that “conform to its intended design” language. Baggot said his colleagues believe changing that language is improper; the language distinguishes a manufacturing case from a design case and eliminates looking at the case from a manufacturing perspective. He believes “intended” means something more than just a little something wrong with the design.

On the issue of whether to use “different from” instead of “does not conform to,” Baggot said that, if the last case discussing the issue uses that definition, the instructions should use that language. Barton noted that there is a desire to use Plain English rather than legalese from case law. Baggot believes “does not conform to” is different than “different from” and is not legalese. He believes “different from” may set a lower bar. Whitmore agrees that the language used is important, is there for a reason, and should not be changed without a reason. Kest said that it is important to define terms that may be legalese. He believes that jurors may not understand and ask what “does not conform to” means, and that judges may give different definitions. Vargas thinks “is different from” is a good Plain English substitution, but she is not sure if it is a substantive change and there is no case law guidance. Ingram noted that, if there is any substantive significance to the change, it should not be made, especially because “conform to” is not that far afield. Lytal likes “is different from”; it is Plain English, and he believes the rest of the instruction provides the clarity needed for any confusion that change may make. Wiggins agrees to using “is different from” because of the overarching directive from the Supreme Court to make the instructions Plain English. Baggot noted that products cases are technical and precise, and he thus does not agree with broadening the language about what the standard is for the jury to look for. Barton said the Committee can include in its report that it does not believe it is a substantive change. He does not believe the language at issue is used by technical people in the field and thus believes witnesses will quickly adapt to any changed language. He referenced a change in the medical malpractice instruction about language about the standard, and he recalls that experts quickly picked up on the change and made it really non-substantive. Boyer agrees with the Plain English change. Baggot asked if any Plain English change has been rejected by the Supreme Court. Barton said that occurred with the second sentence of

the definition of greater weight of the evidence. Baggot asked if this change would be analogous. Vargas noted that the Committee's last proposal, which was rejected, did not use "does not conform." She suggests going back to the PL language. Baggot believes that "different from" is easier to meet.

Lytal moved to adopt yesterday's proposal with "is different from" as follows:

a. Manufacturing defect

A product is defective because of a manufacturing defect if it is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product] and the product is expected to and does reach the user or consumer without substantial change affecting that condition.

A product is unreasonably dangerous because of a manufacturing defect if it is different from its intended design and fails to perform as safely as the intended design would have performed.

Boyer and Wiggins seconded the motion. The motion passed 7-5. Barton noted that this is not a substantive change but a Plain English change, which should go in the report and in a note on use. Boyer suggested noting this was almost the same as PL 4. Vargas said that can be noted in the report to the Supreme Court.

ii. 403.7b – Design Defect (cont'd)

Vargas believes the risk-benefit test is viable as an element of the claim and both the risk-benefit test and consumer-expectation test should be included in the Committee's new 403.7b submission to the Supreme Court. Per the *Union Carbide* case, which was decided after the Supreme Court's original products decision, Vargas believes the risk-benefit test is viable as an element of the claim.

Boyer asked how the subcommittee's proposed language compares to the old PL 5 (p. 230 of the materials). Vargas noted the changes were to put it in the format of the new Book and to change "from" to "because of."

After the Committee's discussion, the language for 403.7b was:

b. Design defect

A product is defective because of a design defect if it is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product] and the product is expected to and does reach the user without substantial change affecting that condition.

A product is unreasonably dangerous because of its design if [the product fails to perform as safely as an ordinary consumer would expect when used as intended or when used in a manner reasonably foreseeable by

the [manufacturer] [seller] [distributor] [supplier] [importer]] [or] [the risk of danger in the design outweighs the benefits].

iii. 403.7 – Notes on Use (cont'd)

Vargas stated that the subcommittee's proposed revisions to Note 1 deleted some language that had been added when the manufacturing and design defect instructions were collapsed and can be updated with information about the non-substantive change in the language of "is different from." Note 3 was updated to refer to the *Union Carbide* and *Agrofollajes* cases. Boyer observed that, if *Union Carbide* adopts the Restatement (Third) and the Supreme Court approves that, it would be a substantial change in the law. Vargas stated that a notice to invoke the Supreme Court's jurisdiction has been filed in the *Union Carbide* case. Barton observed that the Third District declined to certify conflict in *Union Carbide*, and the Supreme Court thus may not take up the case. Baggot noted that the case will not be decided, in any event, by the Committee's April 2013 deadline for submitting the new products instructions. Vargas stated that Note 4 had a similar change.

b. 403.15 – Issues on Main Claim (cont'd)

i. 403.15d – Manufacturing Defect

The subcommittee's proposed revised 403.15d (p. 156 of the materials) is:

d. Strict Liability -- Manufacturing Defect:

whether (the product) [was not built according to its intended design and thereby failed to perform as safely as the intended design would have performed] and (the product) reached (claimant) without substantial change affecting the condition in which it was sold and, if so, whether that failure was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).

Ingram asked if the "substantial change" should affect the condition that makes it defective. He noted that, here, it says "affect the condition *in which it was sold*" without it affecting the defective condition. Ingram and Hinkle suggested making the language parallel to the language in 403.7. Wiggins believes the rest of the language after "and" clarifies the issue and does not require any change in the language. Ingram asked if anything is affected by removing the "in which it was sold" phrase. Baggot believes that liability is only imposed on someone in the chain of distribution – e.g., Enterprise Rent-a-Car is not liable for putting a defective car on the road. Wiggins stated the original language was something like "left the hands of the manufacturer," which is more precise. Lytal, Ingram, and Boyer advocated for removing the "in which it was sold" language.

Vargas noted the need to make the "is different from" change here, which was made to 403.7, and suggested replacing "was not built according to" with "is different from" and then removing completely "in which it was sold." Lytal suggested "was

built different.” It was noted that drugs are not “built.” “Made” was suggested. Boyer suggested “manufacture.” Barnett believes “manufacture” is Plain English. Vargas suggested “made differently from its intended design.” Boyer liked it. Ingram suggested “made differently than its intended design.”

Barton noted that the brackets around the first clause could be removed because it is now not optional language since this refers only to a manufacturing defect. Lytal asked if “that failure” should be changed to “that difference.” Vargas and Barton believed “failure” was needed. Ingram observed that there were many “and”s in the proposal. But he and Vargas believed they were all needed in order to be clear that they were all required elements. Boyer said that it is the product that fails to perform, not the intended design that fails to perform. Boyer suggested changing “perform as safely as the intended design would have performed” to “perform as safely as intended.” Kest suggested a coma after “intended design” to provide clarity. Barton asked if Boyer’s suggestion left the issue of intent ambiguous; it should be clear that it is the intent of the designer that controls. Ingram believes, in common parlance, a “design” can perform. Lytal believes designs perform. Sass suggested adding “the product” after “thereby,” but others believed that was not necessary.

Barton said there was a desire to make this instruction as close to the PL instructions as possible, so the Committee should use that language unless it comes up with something better. Baggot believes there are a lot of changes here for Plain English which he believes may have substantive impacts. Boyer noted that the Committee consensus in the past was that the PL instructions were really not a correct statement of the law. Vargas noted that the Supreme Court should be told why this 403.15 is being changed even though it was preliminarily approved – because it must be consistent with changes to 403.7. Barton agreed. Fox believes that, if the language is wrong, it should be changed. Baggot asked for case law showing the PL language is wrong.

The Committee’s discussion resulted in the following proposal:

d. Strict Liability -- Manufacturing Defect:

whether (the product) was made differently than its intended design, and thereby failed to perform as safely as intended and (the product) reached (claimant) without substantial change affecting the condition and, if so, whether that failure was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).

Lytal moved to approve this proposal; Fox seconded. It was approved 11-2. Vargas noted there will be a chance to talk about it again after it is published for comment. Barton agreed there will be other opportunities to discuss it further. Vargas suggested circulating the new proposals to old Committee members Stewart, Lumish, and Caldwell for their comments. Baggot asked about the minority report process, and Barton explained it.

Boyer asked about transition language in 403.15 between the different issues for determination. He suggested “there are several issues” and “the next issue” as a transition. Vargas noted that judges and lawyers can add that, and that the current proposal is consistent with the format of the new Book.

ii. 403.15e – Design defect

The subcommittee’s proposed revised 403.15e (p. 156 of the materials) is:

e. Strict Liability -- Design Defect:

whether [(the product) failed to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer] [and] [or] [the risk of danger in the design of the product outweighs the benefits of the product] and (the product) reached (claimant) without substantial change affecting the condition in which it was sold and, if so, whether that failure was a legal cause of the [loss] [injury] or [damage] to (claimant, decedent, or person for whose injury claim is made).

Vargas noted the language is straightforward and the same as what was preliminarily approved as 403.15d. Wiggins said that the “in which it was sold” language, removed from 403.15d, should be removed from 403.15e for consistency; Vargas agreed. Boyer asked when the bracketed “and” or “or” is used. Vargas said that is something the Committee does not take a position on. Baggot said that is an issue for debate. Vargas said a note on use could be added here, like the one in 403.7, for when each test should be used. Boyer asked if, in the Committee’s report, the Supreme Court should be asked whether to include “and,” “or,” or both. Lytal asked if “as intended” was necessary since “in a manner reasonably foreseeable” covers that topic. Barton noted that 403.7b uses both phrases. Wiggins noted that it cuts close to a substantive change. It was decided to be left in.

The Committee’s discussion resulted in the following proposal:

e. Strict Liability -- Design Defect:

whether [(the product) failed to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer] [and] [or] [the risk of danger in the design of the product outweighs the benefits of the product] and (the product) reached (claimant) without substantial change affecting the condition and, if so, whether that failure was a legal cause of the [loss] [injury] or [damage] to (claimant, decedent, or person for whose injury claim is made).

Wiggins moved to approve the proposal; Ingram seconded. The proposal was approved, with one opposition by Baggot based on removing the “in which it was sold” language.

c. 403.16 – Crashworthiness

Vargas reminded everyone that the Committee had developed an instruction, after thorough debate, on increased injury from a lack of crashworthiness, which the Committee believed was consistent with *D'Amario v. Ford*. In *D'Amario*, the question was whether the jury could consider the negligence of the driver in an action against the car's manufacturer for lack of crashworthiness, and the Court held that the negligence of the driver could not be introduced because a car manufacturer should assume such negligence and it is therefore not relevant in a crashworthiness case. But, in 2011, after the Committee submitted its proposal, the legislation was passed (pp. 135-37 of the materials) to retroactively overrule *D'Amario*, so that the defendant is treated the same as any other tortfeasor; the jury shall consider the fault of all involved.

The Supreme Court rejected the Committee's proposed crashworthiness instruction without explanation from the majority. Justice Pariente's concurrence referenced the legislative change as the basis for the rejection. The subcommittee believes the legislation is intended to overrule *D'Amario* and is controlling until struck down as unconstitutional. After considerable debate, the subcommittee decided that, since the legislation says to treat them all as regular tortfeasors, the current instructions on causation and damages suffice. There is also an enhanced injury instruction (403.2) already approved. Thus, an actual crashworthiness instruction does not appear necessary. The subcommittee proposed a note on use (p. 158 of the materials) explaining the legislative change:

In 2011, the Legislature amended section 768.81, Florida Statutes, to state that in a products liability case where the plaintiff claims that a defect in the product increased the injury, the defendant should be treated the same as all other defendants for the purposes of apportionment of fault. The legislative history states that the Legislature intended this amendment to overrule the decision in *D'Amario v. Ford Motor Co.*, 806 So. 2d 424 (Fla. 2001). See Ch. 2011-215, §2, Laws of Fla. As explained in the note on use to instruction 402.3, the summary of claims in a crashworthiness case should explain that the plaintiff claims to have sustained greater or additional injuries than would have been sustained if the product were not defective. Otherwise, the standard instructions applicable in other cases should be given in crashworthiness cases.

Kest questioned if the standard causation instructions are adequate if the design-related conduct occurred so long ago. The subcommittee understood the concern but believes the language is adequate.

Baggot asked if the language "greater or additional" injury in 403.2 was from the statute. He believes "enhanced" is the key. He suggests using the statutory language, which is limited to "greater than" and not "additional."

Baggot stated that he questions whether a crashworthiness cause of action even exists anymore. Ingram noted this harkens back to *Stuart v Hertz* principles regarding multiple causes and how they interact. Fox noted the legislation focuses on the cause of the

accident, rather than the cause of the injury, which is the important issue. Ingram observed that the definition of “accident” has been broadened in the statute to include crashworthiness and medical negligence. Hinkle noted that, per the statute, now every potentially responsible party is a defendant.

Kest stated that the “intervening cause” instruction creates confusion here, especially where the crashworthy design was decades earlier. But Kest also noted that changing that part of the legal cause instruction is not before the Committee now and would require extensive work and discussion.

Baggot asked if “greater or additional” should be used in the note. Barton asked Vargas if it was possible to use the language of the statute, and Vargas said it was fine to use “greater” and delete “or additional.” **Ingram moved to approve the subcommittee’s proposed note on use without “or additional”; Boyer seconded; unanimously approved as follows:**

In 2011, the Legislature amended section 768.81, Florida Statutes, to state that in a products liability case where the plaintiff claims that a defect in the product increased the injury, the defendant should be treated the same as all other defendants for the purposes of apportionment of fault. The legislative history states that the Legislature intended this amendment to overrule the decision in *D’Amario v. Ford Motor Co.*, 806 So. 2d 424 (Fla. 2001). See Ch. 2011-215, §2, Laws of Fla. As explained in the note on use to instruction 402.3, the summary of claims in a crashworthiness case should explain that the plaintiff claims to have sustained greater injuries than would have been sustained if the product were not defective. Otherwise, the standard instructions applicable in other cases should be given in crashworthiness cases.

Vargas asked if the change to delete “or additional” also needs to be made to 403.2 (p. 185 of the materials), which also uses “or additional.” Her instinct was to stick with what was preliminarily approved. Barton noted 403.2 was submitted before the statute. Vargas asked if this would affect other causation instructions. Baggot believes it should be changed. **Ingram moved to remove “or additional” from second sentence of 403.2; many seconded; unanimously approved.**

d. 403.11 – Inference of Product Defect or Negligence

As background, Whitmore stated that the Committee had decided not to submit a standard instruction on inferences to be drawn from compliance with government rules or malfunctions during normal operations. The Supreme Court asked the Committee to reconsider the issue.

i. The Government Rules Presumption

Whitmore said section 768.1256, Florida Statutes, provides for a rebuttable presumption to be drawn about product defect and liability based on compliance (or lack of compliance) with applicable government rules. The Committee had drafted and published an instruction on the government rules defense in 2008. Comments

were received, one of which was about the effect of the presumption – *i.e.*, vanishing or burden-shifting. The Committee had substantial debate about that issue, resulting in a stalemate due to the lack of any clear guidance in the statute on the effect of this presumption. The Committee instead proposed a note about not knowing the effect of this presumption and thus its inability to formulate an instruction on it. Whitmore did research on the statute, and there is still no guidance on the type of presumption provided by this statute. Since there has been no further guidance, the subcommittee proposes the same note submitted before for 403.11 (p. 149 of the materials):

1. Florida Statutes section 768.1256 provides for a rebuttable presumption in the event of compliance or noncompliance with government rules. The statute does not state whether the presumption is a burden-shifting or a vanishing presumption. See *F.S.* 90.301–90.304; *Univ. Ins. Co. of N. Am. v. Warfel*, 82 So. 3d 47 (Fla. 2012). Pending further development in the law, the committee offers no standard instruction on this presumption, leaving it up to the parties to propose instructions on a case-by-case basis.

Vargas noted the addition of the cite to the *Warfel* case that involves a jury instruction on a presumption and explains that a vanishing/bursting bubble presumption does not require an instruction, while a burden of proof presumption does require a presumption.

Whitmore noted that the subcommittee attempted to draft an instruction (p. 150 of the materials), starting where the Committee left off in 2009. The subcommittee decided it could not develop something. There were multiple options for the instruction and, without case law guidance, the subcommittee does not know which option to use. Boyer asked if both options could be presented to the Supreme Court – a note and an instruction – and ask the Court to decide which route it likes. Jennings did not know if that was workable. Whitmore added that, without a case, it would tough for the Supreme Court to make that decision. Whitmore observed that, in the past, the Committee has said in these instances that the Committee takes no opinion pending further development in the law. Vargas noted that Ehrhardt’s treatise states that it is unknown what type of presumption this statute creates.

Kest asked if this is a real issue that people are facing that should be addressed. Vargas said Kathleen O’Connor argued for this instruction to the Supreme Court, but Justice Pariente noted that there were no cases in the pipeline on it. **Ingram moved, Fox seconded, to adopt the subcommittee’s suggested note on use 1 (p. 149 of the materials) instead of an instruction. Unanimously approved by the Committee.** Barton asked if the Supreme Court had requested an instruction, and Whitmore said that the Court just said to reconsider the issue.

ii. Cassisi

Vargas stated that the Committee considered the *Cassisi* inference in 2004 and submitted a note on use stating that no instruction was needed for it. Vargas said disagreement exists about when the *Cassisi* inference arises; some believe that the

product just needs to malfunction, while others believe the product must malfunction and be destroyed in the process. The *Gencorp* case, cited in the old note on use for the PL instructions, holds no instruction should be given on the *Cassisi* inference. The subcommittee recommends resubmitting the same note on use submitted in the last products submission (p. 149 of the materials), as the law has not changed:

2. *Cassisi v. Maytag Co.*, 396 So.2d 1148 (Fla. 1st DCA 1981), held that when a product malfunctions during normal operation, a legal inference of product defectiveness arises, and the injured plaintiff has thereby established a prima facie case for jury consideration. Pending further development of Florida law, the committee takes no position on the sufficiency of these instructions in cases in which the *Cassisi* inference applies. See *Gencorp, Inc. v. Wolfe*, 481 So.2d 109 (Fla. 1st DCA 1985); see also *Parke v. Scotty's, Inc.*, 584 So.2d 621 (Fla. 1st DCA 1991); *Miller v. Allstate Ins. Co.*, 650 So.2d 671 (Fla. 3d DCA 1995).

Barton noted that this note on use is not the same as the one from the PL instructions, which included only the second sentence above. Ingram asked if the current note is a substantive change from the PL note because the first sentence now states what *Cassisi* actually holds. Vargas said the current note was vetted last time, was published for comment, the Supreme Court did not state it was wrong, and is a correct statement of the law. Baggot wondered if the language should be qualified “*Cassisi* holds, *among other things*, that . . .” **Ingram moved to adopt the subcommittee’s above proposed note on use, Boyer seconded, unanimously approved.**

e. Miscellaneous – 403.13 and 403.14 (p. 141)

Whitmore stated that it was difficult for the subcommittee to reconcile what the Supreme Court did with respect to its rulings on proposed instructions 403.13 – Preliminary Issue and 403.14 – Burden of Proof on Preliminary Issue. The Court rejected the proposed 403.13 (p. 255 of the materials) without explanation and referred it back to make revisions consistent with other instructions preliminarily approved. At the same time, the Court approved 403.14, which provided a burden of proof instruction for the struck 403.13 preliminary issue. This was tough to reconcile. The Committee sought clarification on this but did not receive any. Whitmore believes there must be a preliminary issue instruction and suggests resubmitting the same 403.13, as there is no real other way to handle it. There is a minor suggested edit to 403.14 (p. 155 of the materials) to be consistent with the new Book.

Barton asked if there was ever any comment in the history of this instruction as to why 403.13 was not approved, or whether the instruction is an incorrect statement of the law. In the absence of that, there is nothing to indicate what is wrong with the proposal. Whitmore does not believe the issue was addressed during oral argument and no one had really commented on it. Barton noted that the Committee was not divided on this instruction; Vargas agreed.

Whitmore said that, if any issues should be pushed for clarification from the Supreme Court, this may be one. Fox urged pushing the Court for clarification. Jennings said that has been tried and never been successful. Barton said he will try again. Kest suggested the report note the Committee's efforts to get clarification as a reason why the Committee is resubmitting the same proposal. Jennings said the Supreme Court could possibly be receptive to a motion for clarification.

Ingram moved to resubmit the same 403.13 (p. 255 of the materials) and revised 403.14 (p. 155 of the materials); Wiggins seconded. Whitmore noted 403.14 has a minor, non-substantive change. The Committee discussed that it should tell the Supreme Court that it changed them as a package to try to address the situation. Unanimously approved.

f. Errors & Omissions and Consistency Review

Vargas said the subcommittee went through all of the products instructions for consistency and in context with intervening court decisions.

Vargas said the 403.9 negligence instruction approved by the Supreme Court deleted the unreasonably dangerous/defect requirement. The subcommittee thus recommends deleting note on use 1 (p. 148 of the materials), which assumed that the plaintiff had to prove defect for the negligence claim. Barton agreed with deleting it and its old case law. **Ingram moved, Boyer seconded, to delete note 1 to 403.9 and reorder the remaining notes to 403.9 appropriately. Unanimously approved.**

Vargas said instruction 403.12's notes on use had a bad cross-reference to 403.10 instead of the correct reference to 403.12 (p. 153 of the materials). Ingram noted that there should be no spaces between 403. and 12a in the notes; Vargas agreed.

Vargas said instruction 403.17 (p. 159 of the materials) has minor changes to make it consistent with reorganized Book. An "s" was added after defendant in first paragraph. "Does" is deleted and an "s" added after "support" in the second paragraph. An "[or]" is added and a bracket moved from after defendant to the end of paragraph in third paragraph. Instruction 402.1 was used as a model for these changes. Jennings noted that the second paragraph should also have "defendant(s)," as in the first paragraph.

Vargas said that instruction 403.18 (p. 160 of the materials) has minor changes to make it consistent with the reorganized Book's negligence instruction. Barton observed that the Supreme Court said this instruction was approved as modified, but there were no modifications in the appendix.

Vargas said instruction 403.19 (p. 162 of the materials) has minor changes to make it consistent with reorganized Book. In addition, this instruction asked the jury to apportion "damages" between defendants, and typically they apportion "fault" between defendants. This has been corrected. There was also a change made consistent with the current E&O report pending before the Supreme Court. The subcommittee also made some changes to the note on use, changing "preemptive charges" to "preemptive instructions" and correcting a bad cross-reference.

Vargas said the Florida Supreme Court also asked the Committee to look at the model charges and verdict forms. Vargas believes the instructions and notes should be finalized first before the models. **Barton said that should be in the report and explained.** Vargas said the Committee can look at models at the next meeting after publication of the instructions discussed at this meeting. Ingram and Hinkle agreed with that approach. Vargas observed that the model charges and verdict forms are also in the process of being revised. Whitmore said there are likely to be changes in the instructions before looking at the models. Ingram agreed. There was no opposition to tabling the models for now.

Barton asked Vargas to circulate the final product of this meeting to the full Committee for review. Barton asked when these revisions can be published for comment. Vargas thought they could be published in the December 1st Florida Bar News for comment. **Comments will be reviewed, and a subcommittee report on the comments will be distributed to the full Committee before the next meeting.**

Kest asked if a response will be received from the Supreme Court to the Committee's clarification questions and whether the Committee should wait for that. Barton said there might be answers but he was unsure.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES

**Coral Gables, FL
Office of Kozyak Tropin & Throckmorton
(Hosted by Neal Roth)**

March 7, 2013 (1:00 p.m. to 5:00 p.m.)

March 8, 2013 (8:30 a.m. to 12:00 p.m.)

7. PRODUCTS LIABILITY

Barton discussed the history of the Committee's extensive work on standard instructions for products liability claims that brought us to this point, with instructions from the Supreme Court on certain proposals that still need work.

Vargas noted publication of the new proposals (pp. 47-82 of the materials). Four comments were received (some are in materials (pp. 83-88) and some were emailed separately because they came in late). The subcommittee met by phone, considered the comments, and distributed a report to the Committee by email with recommendations on the comments and new proposed revisions to the instructions based on the comments.

Three sets of comments came from attorneys who primarily represent plaintiffs in West Palm Beach and raised essentially the same four issues. One set of comment was received from two attorneys who primarily represent defendants.

a. Post-sale duty to warn

The first comment from the plaintiffs' attorneys concerned 403.10 (p. 66 of the materials) should be revised to make clear that the duty to warn includes incidents or accidents that occur after the sale of the product. They cited cases to support this proposition. Sales circulated another case holding the same. The subcommittee agreed with the comment that a defendant does have a post-sale duty to warn of dangers that become known after the sale but that the current proposal covers it and is legally correct. One member of the subcommittee disagreed. The subcommittee wants to further explore the issue and recommends deferring on the issue of whether a note on use is appropriate until after sending up the revised instruction.

b. Preliminary issue instruction 403.13 and 403.14

The second comment from the plaintiffs' attorneys concerned 403.13-.14 (pp. 71-72 of the materials) regarding burden of proof on the preliminary issue. The Committee has previously discussed that it is unsure precisely what the Supreme Court wanted on this instruction based on different aspects of its decision. The commenters believed the instruction could lead jurors to believe that a defendant held strictly liable must have been in a position to correct a defect in the product, even though strict liability is imposed on anyone in the distributive chain. Vargas noted that the note on use says the instruction is for a limited circumstance when a party is in the distributive chain but never has physical possession of the product, and that 403.7 should be used in most circumstances. 403.7 has a similar note that 403.13 applies to those not in physical possession. The subcommittee believes the comment is well-taken and the instruction may do more harm than good, even with the note on the instruction's limited purpose.

DeMahy agreed the instruction makes no sense and may confuse a juror, as physical possession and ability to correct are not elements of strict liability. Sales agrees it makes no sense in a design defect case. The origin of the instruction is *Rivera v. Baby Trend, Inc.*, 914 So. 2d 1102 (Fla. 4th DCA 2005), which is cited in the note. The subcommittee recommends putting "reserved" in 403.13 for the time being and to further consider it.

Barton suggested also removing note on use 6 to 403.7 (p. 63 of the materials) that refers back to 403.13. While Vargas generally agreed, the subcommittee had not considered that specifically. Ingram suggested changing that note 6 to cite *Rivera*. Vargas and Hinkle agreed with that suggestion. Ingram also suggested using a modified version of note 1 to 403.13 as a note for 403.7. Vargas believed that worked with a revision to say that "this instruction may need to be modified...."

DeMahy asked the legal significance of whether a defendant had physical possession of the product to a strict liability claim since all in the distributive chain are liable. Ingram noted that the standard instruction on defect does not discuss those others in the distributive chain. Sales' concern is that the instruction does not tell jurors that those other than designers and manufacturers are equally liable for the defect. DeMahy agreed that the instruction does not appear to cover the full scope of strict liability law. McCloy noted that 403.2 touches on that issue, but DeMahy said that is just introducing/defining

the plaintiff's claim. Ingram asked if 403.15(d) covers it. DeMahy stated that the instructions define manufacturing and design defects but do not tell jurors who are liable. Vargas said that each party in the distributive chain was added to 403.2 in the recent revisions from the old PL instructions. DeMahy noted it was deleted from 403.7, but that is where it should be stressed in defining strict liability. Hinkle noted that *Rivera* was cited because the court used the standard instruction at the time and it was inadequate in that case involving a Chinese manufacturer. DeMahy believes "possession" is confusing in this instruction. DeMahy knows of no defense for someone in the distributive chain about not having possession. If the product is defective and the party is in the distributive chain, they are strictly liable. Sales thinks 403.13 is not a necessary instruction. Vargas agrees it should come out for now and deserves further discussion. Hinkle advocated for a note on use about the issue, as he thinks the issue will come up more and more with distribution of products manufactured in other countries. DeMahy thinks the issue is one of law and for summary judgment/directed verdict, not for the jury. Barton asked if there was ever a reversal for the lack of an instruction on this issue, and no one knew of any. Vargas noted the *Rivera* was a summary judgment, not jury instruction, case; the court rejected the trial court's use of the jury instruction as authority for "possession" being an element of the claim; it is not an element.

Barton noted the consensus appears to be to take out 403.13 and say reserved and take out note 6 to 403.7. The Committee considered possible revisions to note 6, but Vargas recommended removing it completely. Hinkle wondered if the jury should be informed why those in the distributive chain are there as defendants. DeMahy said 403.7 covers it because it refers to those in the distributive chain. Ingram asked, if that was so, why does 403.7 delete the reference to all the parties in the chain of distribution. Vargas explained that that Boyer was concerned that it should be consistent with old PL 5 (discussed at p. 42 of the materials).

DeMahy suggested an introductory phrase to 403.7: "A manufacturer, importer, seller, etc. are strictly liable for [define strict liability]." Vargas noted the desire of the Committee to go back to the PL instructions in substance, with the format of the reorganized book. DeMahy is concerned the jury is not sufficiently instructed in 403.7 regarding who is strictly liable. Vargas noted that 403.15 covers the issues for determination. DeMahy said that is not an instruction on the law. Barton noted that, by the time of trial, if the distributor is in the case, there is no basis to argue they should not be there for not having physical possession. Sales noted the counter-intuitive nature of strict liability for an average juror – that a retailer, which simply sells a product it is given, should be liable for selling a product they had no part in designing or manufacturing or changing. DeMahy believes his proposal is correct on the law and the jury should be instructed on the law. Ingram agreed that was the law but did not think an instruction was truly necessary. DeMahy noted that, at trial, the instruction would include only those types of parties in the chain that are there at trial and there would be no reference to the manufacturer or designer if the only defendant at trial is the distributor. Such an instruction would preclude a defendant from arguing they have no liability as a distributor. Although he did not really think it was needed, Sales suggested doing it more simply putting that language at the end and making it optional for a case when it applies. Vargas thinks just plugging in the actual defendant and facts of the case

will advise the jury. Hinkle advocated for an introductory sentence similar to “[x] [y] and [z] are liable for a defective product that causes harm” and then define the defect. Sales noted his experience with a judge that discussed with the jury during *voir dire* that distributors are equally liable, but the judge would not repeat that concept when instructing the jury at the end. Sales sees this issue coming up more often.

Vargas suggested revising note 6 to say a special instruction is needed if the defendant is someone who did not have actual possession but is still strictly liable. That way, it is flagged at an issue. Russo noted that DeMahy’s concern is that the jury is never told who is liable if they find the product defective. Barton noted 403.15 may do it, but DeMahy does not think that covers it adequately. DeMahy agrees that an introduction or concluding phrase in 403.7 is appropriate to specifically identify which types of parties are strictly liable. Sales and Vargas believed that “strictly liable” is not a phrase that should be used in an instruction. DeMahy is fine with not using that exact language and just saying these parties in the chain are “liable.” Russo does not believe any instruction, even 403.15, tells the jury who is liable. Barton said 403.17 may do that.

Ingram observed that there is no instruction that “everyone who is negligent” is liable, so there is no need for that for a strict liability claim. DeMahy thinks strict liability is different than negligence because of the inherent doubt that jurors have that those simply in the distributive chain are liable; negligence is not as counterintuitive as strict liability. DeMahy thinks strict liability is unique, and it needs to be explained to the jury that everyone in the distributive chain is liable. Ingram thinks the instructions say that, maybe not as clearly as some would like, but they say that. Sales and DeMahy think a note on use may cover this issue sufficiently. Vargas directed the committee to note 6 (p. 63 of the materials) and suggested it be revised to cover this issue and state that a special instruction may be needed in some cases to advise the jury that everyone in the distributive chain is liable. DeMahy thinks “not in physical possession” is unnecessary and confusing; it is not an element of the claim. The Committee discussed the following proposed note:

When a distributor, importer, or intermediate seller played a role in placing the product into the chain of distribution, a special instruction may be needed so the jury understands the defendant is liable to the same extent as the manufacturer or designer.

Sales does not like citing *Rivera* for this note. Lang believes something should be cited, such as the other case cited in note 1 to 403.13, *Samuel Friedland Family Enterprises v. Amoroso*, 630 So. 2d 1067 (Fla. 1994). Sales has other cases he thinks could be cited there. Russo suggested different language for the revised note 6 to 403.7:

In some cases, it may be appropriate to instruct the jury that, in addition to the designer and manufacturer, any distributor, importer, or seller in the chain of distribution is liable for injury caused by a defective product.

The Committee approved this revised note 6 to 403.7, with citations to *Rivera* and *Friedland* and cases provided by Sales (including *Porter v. Rosenberg*, 650 So. 2d 79 (Fla. 4th DCA 1995)).

Lytal asked if this should be an instruction that should always be given with a defendant other than the designer or manufacturer. DeMahy agreed it should be in the instruction in an introductory statement. Ingram said the issue could still be considered, but that it should not be changed now, given that the instructions are technically correct and need to be finalized for submission to the Supreme Court. DeMahy thinks it should be there in the instruction because it is the law. Baggot asked if there are ever trials with only distributors, so why is this necessary in an instruction. Boyer said it can occur when the manufacturer is bankrupt. DeMahy said it occurs with big retailers where the manufacturers are out of the country. The Committee will continue to reexamine whether this should be a note or in an instruction, but will send this up as a note now. Boyer suggested developing a proposed instruction for the next meeting.

c. State of the art defense 403.18(d)

The third comment from the plaintiffs' attorneys concerned 403.18 on defense issues (pp. 79-80 of the materials), specifically subpart d concerning the state of the art defense. They say it is not a true "defense" that results in a defense judgment, which is what 403.19 says. Vargas noted that this defense comes from a statute and tracks the statutory language. Vargas noted that there was debate within the Committee as to where it should go in the book. The plaintiffs' attorneys commenting believe it does not belong in the "defenses." The subcommittee agrees that it is not a complete defense but that the instruction is a correct statement of the law and will not lead to confusion about being entitled to a defense judgment. The subcommittee's recommendation is to not making any change based on this comment.

Wiggins believes it is not a complete defense, but a defense to the discrete issue of whether the product is defective and may need specific language saying that. DeMahy believes it is a factual, not legal, defense that the product is not defective because it was made pursuant to the state of the art. The jury considers this evidence in determining whether the product is defective. Barnett asked if it is waived by not being raised in an affirmative defense. DeMahy does not think so, since it's a factual issue that will come out in discovery and with experts. DeMahy noted that there may be cases where state of the art does not matter because plaintiffs will argue that the defendant should have never made the product at all since it was dangerous, even if state of the art. Vargas said there is some case law that says it is waived if not raised as a defense; the issue was debated in the subcommittee.

Sales noted that the statute says "the jury shall consider..." Since defects are compared against other forms of fault, including simple negligence, Sales believes the jury needs to know what the statute says and compare that against the respective fault. DeMahy does not believe that degrees of defect can be considered in the strict liability context. DeMahy does not think there needs to be an instruction because it is factual, not legal. Ingram asked when the statute applies. Vargas read the statute, and it says the jury shall consider the state of the art at the time of manufacture in a design defect case. Ingram observed that the statute says in an action against a manufacturer. DeMahy does not think it applies only to manufacturers, but also to retailers, etc. No one knew of case law on that issue. Wiggins suggested a note that, even though the statute says only

manufacturers, the Committee takes no position on whether it applies to retailers. Vargas is comfortable saying it applies in design defect cases and not specifying which categories of defendants it applies to, pending further case law development.

Baggot noted the statute says “defense” and thus appears to belong in 403.18. The commenters recognized that, but said it is wrong. Hinkle noted it says “defense” in the title only, not the text, which is what matters. Burlington observed that 403.19 says the burden of proof is on the defendant, which makes no sense with this state of the art “defense.” The jury does not make a specific finding on state of the art; it merely considers it with the other evidence. He advocates for moving it to another section of the instructions but thinks it accurately states the statute.

Whitmore observed that this instruction was already preliminarily approved by the Supreme Court. Vargas does not think it is confusing in its current form, but that the Committee can still work on it going forward. **Vargas moved, Ingram seconded, and the Committee decided to leave 403.18(d) in its current form for now and to consider it in the future, just not for the current revisions that need to be submitted shortly.**

d. “Fault” in 403.19

The final comment from the plaintiffs’ attorneys concerned 403.19 (p. 81 of the materials) and its use of “fault” throughout this burden of proof on defense issues instruction, as technically the defendant is liable without fault. The Committee used “fault” in order to tell the jurors how to apportion fault comparatively. The commenters did not believe that plaintiffs have the burden to prove fault, making this instruction unfair. The subcommittee, over Burlington’s objection, decided to leave it in its current form because it is a plain English instruction and there really is no alternative when dealing with apportionment of liability. Hinkle asked if “liability” works. Vargas does not think that is plain English and simple. Russo asked if “responsible” works. Lytal agreed with that. Barton remembers struggling with this issue before and arriving at the conclusion that “fault” works best. Vargas noted that Campo thought this was the best language for jurors and that the Supreme Court already approved it. Sales and Hinkle noted that strict liability is “liability without fault.” **The Committee decided to leave the instruction in its current form, at least for now.**

e. Note on use 1 to 403.7

The defense attorneys commented that the first sentence of note on use 1 to 403.7 (p. 61 of the materials) is not needed and the citations to *Ford Motor Co. v. Hill*, 404 So. 2d 1049 (Fla. 1981), and *McConnell v. Union Carbide Corp.*, 937 So. 2d 148 (Fla. 4th DCA 2006), are incorrect. Vargas noted the Committee had a heated debate on this issue before. **The subcommittee recommends deleting the sentence and citations, as they were added when manufacturing and design defects were combined, but they are now separate. It also relates to pleading issues and not jury instructions. The Committee agreed.**

f. Note on Use 5 to 403.7

The second comment from the defense attorneys concerned note on use 5 to 403.7 (p. 63 of the materials). They raised issues about inconsistent verdicts and the two-issue rule and requested the Committee put in a new instruction (p. 5 of subcommittee memo):

In order to find [defendant] liable for negligent [design] [manufacture] [importing] [selling] [supplying], you must first find that the [describe product] was in a defective condition, as defined earlier.

The concern is a line of cases about inconsistent verdict if there is finding of no defect but negligence based on design. When the Committee sent up its original report, it included language (p. 6 of subcommittee memo) to get rid of inconsistent verdict problem:

Negligence is doing something that a reasonably careful [designer] ... would do under like circumstances, which results in a product being in an unreasonably dangerous condition.

But the Supreme Court took out the “which results in a product being in an unreasonably dangerous condition” language. So, the subcommittee does not want to put something in this instruction that the Supreme Court has already disapproved.

The commenters also suggested notes on use (pp. 5-6 of subcommittee memo) warning about the potential problems with inconsistent verdicts and the two-issue rule that come from the prior PL instructions:

In cases involving claims of both negligence and defective design, submission of both claims may result in an inconsistent verdict. *See, e.g., Consol. Aluminum Corp. v. Braun*, 447 So. 2d 391 (Fla. 4th DCA 1984); *Ashby Div. of Consol. Aluminum Corp. v. Dobkin*, 458 So. 2d 335 (Fla. 3d DCA 1984). *See also Moorman v. American Safety Equip.*, 594 So. 2d 795 (Fla. 4th DCA 1992); *North American Catamaran Racing Ass’n. v. McCollister*, 480 So. 2d 669 (Fla. 5th DCA 1985).

* * *

The committee notes, however, that the two issue rule may be implicated if both tests of design defect are used. *Zimmer Inc. v. Birnbaum*, 758 So.2d 714 (Fla. 4th DCA 2000).

The subcommittee recommends putting those back in the current instructions. Barton asked where they should go. **The subcommittee recommends placing the second one listed above, regarding the two-issue rule, at the end of note 3 to 403.7. The subcommittee recommends placing the other suggested note on inconsistent verdicts at the end of note 5 to 403.7.**

Burlington believes the two-issue rule is an appellate or verdict form issue, not a jury instruction issue, so he is not sure a note on use is appropriate here. Sales says it comes up when deciding whether the verdict form should have one question or two, and he thinks the plaintiff has the choice as to what they want to submit and if they end up with a two-issue problem that is of their own making. Vargas stated that the note simply informs practitioners of the cases on this issue. Vargas said this can be considered again in discussing verdict forms and model charges. Ingram asked if there are notes on use for verdict forms. Vargas said there is nothing stopping the Committee from adding notes on use to model verdict forms.

Sales stated that the cases on this issue are all district court of appeal cases and likely decided before the consumer expectation test was adopted. He thinks failure to use reasonable care and distributing a defective product are two separate things; they are not synonymous. Burlington says he always sees plaintiffs going with strict liability and avoiding the problem of a separate negligence question being answered inconsistently, as the remedy is strangely a directed verdict.

Lytal believes the subcommittee's proposal should be adopted. No one disagreed.

g. Strict liability failure to warn – note on use 1 to 403.8

The last comment from the defense attorneys was to add a cite to *Union Carbide Corp. v. Aubin*, 97 So. 3d 886 (Fla. 3d DCA 2012), in note on use 1 to 403.8. The case concerned strict liability failure to warn and tracks the language in the instruction. **The subcommittee agreed with that suggestion. The Committee did not disagree.**

h. Editorial changes

The subcommittee also fixed some typos, which are noted in its report (p. 7 of subcommittee memo):

403.7: Changed typeface of the title to bold.

403.18: Corrected a typo in the note on use to instruction 403.18d that mistakenly referred to “403.7d” instead of “403.18d.” (Changed “Instruction 403.7d applies only in ...” to “Instruction 403.18d applies only in...”).

Barton discussed the report that will go up to the Supreme Court and how the Committee's vote should be noted. **Boyer moved, seconded, and the Committee unanimously voted to approve the foregoing changes.** The Committee thanked the products subcommittee for their hard work on this issue, in particular Vargas for her leadership of the subcommittee and her extensive work.